

In the Matter of Merchant Mariner's Document No. Z-756328-D1 and all other Licenses and Documents

Issued to: FAUSTINO COLON OTERO

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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FAUSTINO COLON OTERO

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 15 December 1955, an Examiner of the United States Coast Guard at New York, New York suspended Merchant Mariner's Document No. Z-756328-D1 issued to Faustino Colon Otero upon finding him guilty of misconduct based upon three specifications alleging in substance that while serving as saloon messman on board the American SS ALAMO VICTORY under authority of the document above described, on or about 29 October 1955, while said vessel was in the port of Bremerhaven, Germany, he wrongfully assaulted a fellow crew member with a dangerous weapon; to wit, a "T" wrench (First Specification), he wrongfully engaged in a fight with the same fellow crew member (Second Specification), and he was disorderly on board the ship (Third Specification).

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer and Appellant's counsel made their opening statements. The Investigating Officer introduced in evidence the testimony of Messman Lloyd G. Burkhardt (the crew member allegedly assaulted) and the testimony of Third Cook Brown (an eyewitness to the incident).

In defense, Appellant offered in evidence his sworn testimony, the testimony of two character witnesses, and a letter commending Appellant for his exemplary service on the ship. Appellant testified that when he left the room to go to work, Burkhardt was 15 feet away in front of the P.O. Messroom in the port fore and aft passageway waiting for Appellant with an ax held like a baseball bat, Appellant picked up a wrench, walked aft to within 4 feet of where Burkhardt was standing near the intersection of the port fore and aft passageway and thwartship passageway, threw the wrench away and tried to disarm Burkhardt who then pushed Appellant to the deck with the ax handle, dropped the ax and kicked Appellant approximately 12 feet across the thwartship passageway. Appellant

also states that he never threatened Burkhardt; appellant approached Burkhardt in the passageway because Appellant did not think Burkhardt actually wanted to fight; Appellant saw the Chief Cook at the time of this incident; Third Cook Brown's version was not true; Appellant told a different story to the Master on 30 October because of fear as to what Burkhardt might do to Appellant; Appellant did not go ashore on 31 October and he never gets drunk.

In rebuttal, the Investigating Officer introduced in evidence certified copies of entries in the Official Logbook of the ship. This was two weeks after Burkhardt and Brown had testified.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and three specifications had been proved. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-756328-D1, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of 18 months - 9 months outright suspension and 9 months suspension on probation until 12 months after the terminations of the outright suspension.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 29 October 1955, Appellant was serving as saloon messman on board the American SS ALAMO VICTORY and acting under authority of his Merchant Mariner's Document No. Z-756328-D1 while the ship was docked at Bremerhaven, Germany.

Appellant's room on the ship was on the port fore and aft passageway about 15 feet forward of the P.O. messroom and the thwartship passageway which was approximately 30 feet in length. The galley was directly aft of the thwartship passageway on the port side and the pantry was in the same relative position on the starboard side near the starboard fore and aft passageway. Appellant shared his quarters with P.O. messman Burkhardt and crew messman La Rue.

Burkhardt returned on board at Approximately 0500 on 29 October 1955. Appellant returned about 0515 in an inebriated condition. Both men were supposed to be on duty at 0600. The steward called them at 0530 but could not awaken Appellant. The steward said Appellant would be logged is he did not get up. La Rue left the room and Burkhardt went to the washroom. When Burkhardt returned to the room, he awakened Appellant and told him what the steward had said about logging Appellant. The latter told Burkhardt to mind his own business, got out of his bunk, swung at Burkhardt and missed when Burkhardt ducked. Burkhardt left the room and went to work in the P.O. messroom at 0610.

After cleaning the P.O. messroom, Burkhardt went along with thwartship passageway towards the starboard side and entered the pantry to get silverware. In the meanwhile, Third Cook

Brown left the galley and walked to port along the thwartship's passageway in order to get to the storeroom which was at the intersection of the latter passageway and the port fore and aft passageway. Brown saw Appellant approaching along the port fore and aft passageway with a large T-type fire hose spanner wrench in his right hand. When Appellant reached the intersection of the two passageways just outside of the P.O. messroom, Brown grabbed Appellant and attempted to take the wrench away from him. Appellant still appeared to be in a drunken condition. At this time, Burkhardt left the pantry and saw the two men struggling. He dropped the silverware and obtained possession of a fire ax which was on a bulkhead of the starboard fore and aft passageway a few feet from the pantry door. Burkhardt returned to approximately the middle of the length of the thwartship passageway as Appellant broke away from Brown and advanced upon Burkhardt. Appellant still had the wrench in his possession. Burkhardt held the ax in a horizontal position in front of him with his right hand near the head of the ax and his left hand at the end of the handle. Appellant attempted twice to strike Burkhardt with the wrench but Appellant warded off the blows which struck the ax. Using the ax for protection, Burkhardt managed to force Appellant backward until Brown was able to grab Appellant from behind and disarm him. The Chief Cook came out of the galley and Burkhardt gave the ax to him. Appellant and Burkhardt were temporarily restrained by Brown and the Chief Cook, respectively. Then they both got free and engaged in a fight, without weapons, which took place near the port end of the thwartship passageway. The Chief Mate eventually was called and stopped the fight in which Appellant was badly beaten.

Entries were made in the ship's Official Logbook concerning this incident and the two combatants were severely reprimanded. The main entry was based on a statement by the Chief Steward who admittedly did not arrive on the scene until after the two men had been disarmed. The Chief Steward stated that the fight with weapons was witnessed by Brown and the Chief cook.

Appellant entered a reply to the log entry some hours after he returned on board the ship in an inebriated condition on 31 October.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

Point I The credible evidence does not sustain the allegations contained in the three specifications. The evidence establishes that Burkhardt assaulted Appellant. The log entry shows that Burkhardt viciously assaulted Appellant. Brown testified that Burkhardt got a fire ax and approached Appellant while he was in the port passageway. Both Brown and Burkhardt admitted that the chief Cook grabbed Burkhardt and pinned his arms behind his back. The testimony of Burkhardt and Brown is incredible. There is such conflict between the testimony of the latter two witnesses as to compel the conclusion that their versions of the incident were fabricated to protect Burkhardt. The latter could not have seen Appellant and Brown tussling the port passageway, if Burkhardt was in the pantry near the starboard passageway. Appellant's testimony that Burkhardt, Brown and La Rue were friends and did not like Appellant was not denied. Other eyewitnesses whose names appear in the log entry were not called by the Investigating Officer. Due weight was

not given to the evidence pertaining to Appellant's good character.

Point II. Appellant was deprived of his constitutional right to a fair trial. The Investigating Officer deliberately refused to produce the statements taken and the report of investigation made at Bremerhaven. The only inference is that these documents would have destroyed the case against Appellant. The Investigating Officer was bound to produce pertinent evidence even if it tended to establish Appellant's innocence. The Investigating Officer failed to produce the log entries, which contained facts that would have completely destroyed the credibility of Burkhardt and Brown, until they had departed from the United States. This deprived Appellant of his right to a full and proper cross examination of these two material witnesses. A case must be reversed when material evidence is suppressed (Citing cases).

Point III. The order was excessive in view of Appellant's prior clear record and the evidence as to his good character and reputation. In conclusion, it is respectfully urges that the charges should be dismissed or that the order be remitted and Appellant's document returned to him.

APPEARANCES: Myron M. Fineman, Esquire, of New York City, of Counsel

OPINION

The conflict in testimony between the version presented by Appellant and that presented by Burkhardt and Brown constituted and issued of credibility which was resolved against Appellant by the Examiner. As the trier of the facts who heard and observed the witnesses, the Examiner was in the best position to judge their credibility.

The record does not support Appellant's contention (Point I) that the initial assault was committed by Burkhardt. The log entry supports testimony of Burkhardt and Brown to the effect that there were two different phases of this incident - what happened when the two men were armed with weapons and the fight after they were both disarmed. The specifications in this case are directed only towards the former of these two phases. What happened later is immaterial except with respect to the credibility of the witnesses.

The log entry indicates that Appellant was almost beaten to death whereas Burkhardt states that he rolled over on top of Appellant and was straddling him. But a close review of the record shows that Burkhardt was not questioned as to what happened subsequently until the Chief Mate stopped the fight, and Brown was not questioned at all with respect to the progress of the fight. Hence, the credibility of Burkhardt and Brown is not suspect simply because they did not relate the details contained in the logbook entry. In addition, it is noted that the latter entry was based on a statement by the Chief Steward rather than an independent investigation by the Master. The Chief Steward did not testify and his statement that Appellant appeared to be near death is belied by Appellant's testimony that he went to work on the same day and the log entry which states that Appellant was ashore two days later.

As to other alleged inconsistencies or inaccuracies in the testimony of Burkhardt and Brown, there are none except extremely minor ones such as possible errors in Burkhardt's estimates of time, the brand of cigarettes Burkhardt smoked and the exact position of Burkhardt, Brown and Appellant when Appellant was approaching with the wrench in his hand. These were minor discrepancies which are not sufficient to cast reflection upon the material portions of the testimony of Burkhardt and Brown. Although it is a recognized fact that a person's recollection of his observations at a disorderly scene is subject to error as to details, it is perfectly clear from the testimony of Brown that he saw Appellant when he was some 10 or 12 feet forward of the thwartship passageway but that the two seamen did not commence grappling until Appellant was outside the P.O. messroom at the intersection of the thwartship and fore and aft passageways. Hence, it is obvious that Burkhardt could see the two men when he left the pantry opening on the thwartship passageway. Appellant's brief contains other misstatements as to what the testimony of Burkhardt and Brown was at the hearing.

After Burkhardt obtained possession of the fire ax, he held it in a defensive position even though he did advance toward Appellant until both were at approximately the middle of the 30-foot long thwartship passageway. It is also evident that Appellant advanced about 15 feet from the scene of his encounter with Brown. When Appellant swung the wrench and twice struck the ax held by Burkhardt, Appellant definitely was the aggressor and guilty of assaulting Burkhardt. There was no attempt by Burkhardt to use the ax in any other manner than to protect himself. By forcing Appellant backward, Burkhardt made it possible for Brown to come up behind Appellant and disarm him. It was only after the two men were disarmed that the Chief Cook held Burkhardt while attempting, together with Brown, to keep the two men from fighting.

Appellant's testimony is replete with unrealistic statements as indicated above in a partial resume of his testimony. The most glaring example of his imagination is his contention that he rushed up to within 4 feet of a seaman holding a fire ax as though he was ready to swing it like a baseball bat and then both of them put down their weapons without making any attempt to use them. Appellant admitted that the story he told the Master on 30 October was different from the version presented by Appellant at the hearing. The implication is that Appellant's testimony is more favorable to his cause than was his story to the Master on the day after the incident when the facts were clearer in his mind. Appellant's credibility is also made questionable by his testimony that he did not go ashore on 31 October and that he never gets drunk. The log entries disagree with both statements. The testimony of both Burkhardt and Brown indicates that Appellant was under the influence of intoxicants at the time of the events in question.

Appellant also claims that he was deprived of his constitutional right to a fair trial since the Investigating Officer failed to make available certain documents (Point II).

The nature of the log entries which were introduced to rebut Appellant's testimony that he never gets drunk and that he did not go ashore on 31 October, has been pointed out above. Since the main entry pertaining to this incident was based on a statement by the Chief Steward who neither testified nor saw the two seamen with weapons, it is inconceivable how earlier knowledge of this

entry could have enabled Appellant to attack the credibility of Burkhardt and Brown on cross-examination. The entry might have had some value along these lines if it had disclosed the names of unknown witnesses to the events which took place when Burkhardt and Appellant had weapons. But the only witness named, other than Brown, was the Chief Cook. It is perfectly clear from Appellant's testimony that he saw the Chief Cook, so there was no question of suppression of evidence in this respect. Appellant was as free to call the Chief Cook as his witness as was the Investigating Officer. In addition, it is noted that the Examiner repeatedly informed counsel for Appellant, after the log entries had been seen by counsel and received in evidence, that he was at liberty to make application to have Burkhardt return for further questioning. (Of course, this would apply equally to Brown and the Chief Cook.) Counsel declined to take advantage of this opportunity.

Concerning Appellant's contention that the Investigating Officer refused to produce the report of investigation and statements made at Bremerhaven, it is first pointed out that the Investigating Officer at the hearing said he had only the report of the Bremerhaven Investigating Officer. Nothing in the record indicates that the Investigating Officer at the hearing had any statements in his possession. Secondly, it is significant that the Examiner reserved his ruling on counsel's demand for these documents, the hearing was adjourned for two weeks, and counsel did not renew his request to see these documents at any time after the hearing was reconvened. Hence, any rights of Appellant were waived by such failure to renew the demand in the absence of a ruling by the Examiner on this point.

Under these circumstances, counsel's strong insinuations that Appellant was found guilty on the basis of testimony of Burkhardt and Brown, which was known by the Investigating Officer to be perjured, are completely unmerited and reprehensible. The situation herein is entirely different from the cases cited by Appellant such as Mooney v. Holohan (1934), 294 U.S. 103, wherein it was held that there was a denial of due process of law when a conviction was based on known perjured testimony and the deliberate suppression of evidence which would have impeached and refuted the perjured testimony against the defendant.

The facts show that Appellant was properly found guilty of an assault with a dangerous weapon, wrongful fighting, and disorderly conduct. since the Examiner considered Appellant's prior clear record and the evidence pertaining to Appellant's good character, it is my opinion that the 9 months outright suspension and the additional probationary suspension imposed by the Examiner should be sustained. This was a serious breach of discipline which must be severely dealt with for the protection of seamen on merchant vessels of the United States.

ORDER

The order of the Examiner dated at New York, New York, on 15 December, 1951, is **AFFIRMED**.

A. C. Richmond
Vice Admiral, U. S. Coast Guard
Commandant

Dated at Washington, D. C., this 10th day of October, 1956.